(9)

No. 04-1506

NOV 22 2005

In The Supreme Court of the United States

ARKANSAS DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,

Petitioners,

v.

HEIDI AHLBORN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed May 9, 2005
Certiorari Granted September 27, 2005

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

September 30, 2002 – Plaintiff's complaint filed in the United States District Court for the Eastern District of Arkansas, Western Division.

October 18, 2002 – Defendants' answer filed.

February 18, 2003 – Stipulation filed jointly by plaintiff and defendants.

March 6, 2003 – Defendants' motion for summary judgment filed.

March 6, 2003 – Defendants' memorandum in support of motion for summary judgment filed.

March 6, 2003 – Defendants' statement of material facts filed.

April 17, 2003 – Plaintiff's response to defendants' motion for summary judgment, as well as cross motion for summary judgment, filed.

April 17, 2003 – Plaintiff's memorandum brief in support of motion for summary judgment and cross motion for summary judgment filed.

April 17, 2003 – Plaintiff's response to defendants' statement of material facts, as well as plaintiff's statement of material facts, filed by plaintiff.

April 23, 2003 – Defendants' response to plaintiff's cross motion for summary judgment filed.

April 23, 2003 – Defendants' memorandum in support of response to plaintiff's cross motion for summary judgment filed.

April 23, 2003 – Defendants' response to plaintiff's statement of material facts filed.

August 25, 2003 – Order and Judgment of the district court entered, granting defendants' motion for summary judgment and denying plaintiff's cross motion for summary judgment.

September 18, 2003 – Plaintiff's notice of appeal filed.

March 14, 2005 – Opinion and Judgment of the United States Court of Appeals for the Eighth Circuit entered, reversing the district court and remanding case with directions to enter judgment in favor of defendants in amount of $35,581.47.

May 9, 2005 – Petition for Writ of Certiorari filed by defendants/petitioners.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

HEIDI AHLBORN, Plaintiff VS. ARKANSAS DEPARTMENT OF HUMAN SERVICES; DIRECTOR OF THE ARKANSAS DEPARTMENT OF HUMAN SERVICES; AND DIRECTOR OF THE THIRD PARTY LIABILITY UNIT, DIVISION OF MEDICAL SERVICES OF THE ARKANSAS DEPARTMENT OF HUMAN SERVICES, Defendants	CASE NO. 4-02.CV.00607GTE This case assigned to District Judge Eisele and to Magistrate Judge Jones

COMPLAINT

(Filed Sep. 30, 2002)

Comes Heidi Ahlborn, Plaintiff herein, and for her claim against Arkansas Department of Human Services (hereinafter referred to as "Department"); the Director of the Arkansas Department of Human Services (hereinafter referred to as "Director"); and Director of the Third Party Liability Unit, Division of Medical Services of the Arkansas Department of Human Services (hereinafter referred to as "Division Director"), states:

1. Plaintiff is a citizen of the State of Arkansas. Defendant Department is a department of the Arkansas state government charged with the responsibility of administering the Medicaid program. Defendant Director

is the state administrative official charged with administration of Defendant Department. Defendant Division Director is the state official within the Defendant Department charged with the responsibility of administering and enforcing liens or other rights by reason of payments made to or on behalf of Medicaid beneficiaries. Defendants all reside within the Eastern District of Arkansas. Plaintiffs claims herein for injunctive and declaratory relief involve assertion of rights under the laws of the United States, specifically 41 U.S.C. § 1396p and 42 U.S.C. § 1983. Jurisdiction of Plaintiff's claims herein is pursuant to 28 U.S.C. § 1331.

2. On January 2, 1996, Plaintiff sustained a serious injury in a motor vehicle accident in Sharp County, Arkansas. As a result of those injuries, Plaintiff required extensive medical treatment. During the time of her treatment, Plaintiff qualified for medical benefits under the Medicaid program, administered within the State of Arkansas by Defendant Department. Defendant Department provided Medicaid benefits to or on behalf of Plaintiff in the amount of $219,156.78.

3. Plaintiff has previously made claims against others for damages arising out of injuries she received in the occurrence on January 2, 1996, which claims resulted in compromise settlements totaling $550,000.00 of which $25,000.00 was paid by Plaintiff's own insurance company pursuant to her underinsured motorist coverage. Plaintiff sustained serious permanent personal injuries as a result of the occurrence, fair compensation for which greatly exceeded the amount of the compromise settlement, which amount was greatly influenced by serious issues of liability and monetary limitations of some of the insurance policies involved. These sums were paid in full and complete

settlement of all claims of any nature, whether past or future, arising out of her injuries in this occurrence.

4. Defendant Division Director has, pursuant to Ark. Code Ann. § 20-77-301, *et seq.*, asserted a claim or lien in the amount of $219,156.78 against the funds Plaintiff received as a result of the above-described settlement. Plaintiff's attorneys are holding, in a trust account, the sum of $219,156.78 pending resolution of the claims and request for relief asserted herein.

5. The above-described funds, presently held by Plaintiff's attorneys in trust, for Plaintiff's benefit, constitute Plaintiff's property as to which Defendant Division Director asserts a lien and a claim for payment.

6. There exists a genuine controversy between Plaintiff and Defendants as to extent of Defendants' right of repayment from property owned by Plaintiff and the extent to which Ark. Code Ann. § 20-77-301, *et seq.*, as applied to Plaintiff's property hereinabove described, is preempted by 42 U.S.C. § 1396p(a) and whether Defendants' assertion of a lien against Plaintiff's property, under color of state law, deprives Plaintiff of a right under 42 U.S.C. § 1396p(a) and therefore is in violation of 42 U.S.C. § 1983. Plaintiff therefore requests declaratory relief, pursuant to 28 U.S.C. § 2201, declaring the respective rights of the parties as regards these funds and construing and determining the extent to which Ark. Code Ann. § 20-77-301, *et seq.*, may be applied to these funds, under the supremacy clause, Article VI, United States Constitution.

7. 42 U.S.C. § 1396p(a)(1) provides:

> "No lien may be imposed against the property of any individual prior to his death on a count of medical assistance paid or to be paid on his behalf under the state plan, except. . . . "

None of the exceptions to this provision are applicable here. The lien claimed by Defendants against Plaintiff's property arises out of medical assistance paid under a state plan.

8. As a direct result of the motor vehicle accident on January 1, 1996, Plaintiff sustained severe personal injuries, the most significant of which was a closed-head injury which caused permanent brain damage. As a direct result of these injuries, Plaintiff incurred medical expenses in addition to those provided by Defendant and has sustained in the past and will sustain in the future pain, suffering and mental anguish; will incur medical expenses in the future for which Defendant will not be responsible; has sustained a loss of earnings in the past and a past and future permanent loss of earning capacity; and has sustained a significant permanent disability. Plaintiff was, at the time of her injury, 19 years of age with a future statistical life expectancy of 59.02 years. Plaintiff's damages, as a result of these injuries, exceed, by many fold, the total sum realized from all sources ($550,000.00), $25,000.00 of which was from Plaintiff's own insurance coverage which should be excluded from consideration.

9. Plaintiff's right to compensation for each of these elements of damage, recognized under Arkansas law, constitutes a separate property interests of Plaintiff.

10. Ark. Code Ann. § 20-77-307, upon its face, provides for an assignment to Defendant Department of

all claims arising out of her injury. To the extent that such assignment extends to Plaintiff's claim for elements of damage for other than past medical expenses, the assignment and lien created by Ark. Code Ann. § 20-77-307 is a direct violation of Plaintiff's rights under 42 U.S.C. § 1396p(a)(1), as constituting a lien upon Plaintiff's property, and is therefore, to that extent, invalid by reason of the supremacy clause.

11. To the extent that Ark. Code Ann. § 20-77-307 creates a lien upon Plaintiff's claim for compensation other than for medical expenses, it deprives Plaintiff of a right created by 42 U.S.C. § 1396p(a)(1) and therefore is in violation of 42 U.S.C. § 1983.

12. Plaintiff requests that the Court adjudicate, by way of a declaratory judgment, that the rights of Defendant Department, pursuant to Ark. Code Ann. § 20-77-301, *et seq.*, including but not limited to 20-77-307, to the extent it seeks to reach that portion of Plaintiff's settlement other than that attributable to medical expenses furnished by Defendant Department, constitutes an impermissible lien, upon Plaintiff's property, in violation of 42 U.S.C. § 1396p(a)(4) and, to such extent, deprives Plaintiff of a right created by the laws of the United States, in violation of 42 U.S.C. § 1983. Accordingly Plaintiff requests that the Court adjudicate and declare such statute to be invalid, under the supremacy clause, to that extent.

13. Plaintiff further requests that the Court adjudicate and declare, by way of a declaratory judgment, that the proceeds from the underinsured motorist coverage, be excluded from computations requested herein.

14. Plaintiff further requests that the Court determine, by way of a declaratory judgment, the extent to which the settlement proceeds of $525,000.00, excluding underinsured motorist benefits, are attributable to past medical expenses furnished by Defendant Department and that the Court further adjudicate and declare, by way of a declaratory judgment, that the lien or right of recovery of Defendant Department is limited to that portion of the settlement adjudicated to be attributable to these past medical expenses.

15. Plaintiff further requests that Defendant Director and Defendant Division Director be permanently enjoined from seeking to impose a lien pursuant to Ark. Code Ann. § 20-77-307, and be enjoined from instituting any action pursuant to Ark. Code Ann. § 20-77-305, beyond seeking recovery of that portion of Plaintiff's settlement, excluding underinsured motorist coverage, adjudicated herein to be that attributable to Plaintiff's past medical expenses furnished by Defendant Department.

WHEREFORE, Heidi Ahlborn, Plaintiff herein, demands declaratory and injunctive relief against Defendants and each of them, as hereinabove set forth and that Plaintiff be granted all further relief which the Court deems just and proper including recover of costs and attorney fees, pursuant to 42 U.S.C. § 1988(b).

HEIDI AHLBORN

Plaintiff

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

HEIDI AHLBORN, Plaintiff VS. ARKANSAS DEPARTMENT OF HUMAN SERVICES; DIRECTOR OF THE ARKANSAS DEPARTMENT OF HUMAN SERVICES; AND DIRECTOR OF THE THIRD PARTY LIABILITY UNIT, DIVISION OF MEDICAL SERVICES OF THE ARKANSAS DEPARTMENT OF HUMAN SERVICES, Defendants	)	CASE NO. 4-02-CV.00607GTE

ANSWER

(Filed Oct. 18, 2002)

The defendants, Arkansas Department of Human Services, Director of the Arkansas Department of Human Services, and Director of the Third Party Liability Unit, Division of Medical Services of the Department of Human Services, and for their answer to the complaint, state as follows:

1. Admits plaintiff is a citizen of the State of Arkansas. Admits the Department of Human Services (Department) is a department within the Executive Branch of the Arkansas State government. Affirmatively pleads that the Department enjoys sovereign immunity and is not a proper party. Admits that the Director of the Department

is Kurt Knickrehm. Further admits that Mr. Knickrehm is the officer responsible for operations within the Department. Admits that Ray Hanley is the Director of the Division of Medical Services (DMS) within the Department. Further admits that Mr. Hanley has general oversight responsibility for the operations of the DMS. Further admits that Mr. Wayne E. Olive is the DMS Program Administrator, responsible for operation of the Third Party Liability Unit within DMS. Admits the parties reside in the Eastern District of Arkansas. The remaining allegations of paragraph 1 of the complaint do not set facts to which response is necessary, however, to the extent response is required same are denied.

2. Admits that plaintiff sustained an injury and required medical treatment. Admits that some or all of the costs of medical treatment were paid through the Arkansas Medicaid Program. Further admits that the Arkansas Medicaid Program has paid at least $215,645.30. The amount in dispute continues to increase as plaintiff receives additional health care services related to the accident. The $215,645.30 paid by the Arkansas Medicaid Program satisfied bill charges of $320,642.18. Pursuant to federal and state law plaintiff has no obligation to satisfy the unpaid balance. Plaintiff remains eligible for benefits furnished under the Arkansas Medicaid Program and defendants reasonably anticipate that additional charges will be incurred and paid by the Arkansas Medicaid Program.

3. Defendants admit that plaintiff has settled various claims against third parties liable for the injuries sustained by plaintiff. At the time plaintiff entered into the settlement plaintiff was aware of the payments made by the Arkansas Medicaid Program but plaintiff failed to

afford the Arkansas Medicaid Program notice of the settlement negotiations or proceedings. Despite plaintiff's prior assignment of rights in favor of the Arkansas Medicaid Program and despite actual notice of payments made by the Arkansas Medicaid Program, plaintiff failed to afford defendants notice of settlement proceedings and effectively foreclosed defendants from asserting their interest directly to the third parties liable for plaintiff's injuries. Plaintiff, by entering into a full and complete settlement of all claims of any nature, whether past or future, arising out of her injuries, is estopped to deny the adequacy of the settlement and is estopped to deny full reimbursement to the Arkansas Medicaid Program.

4. Defendants admit that, pursuant to 42 U.S.C. § 1396a(a) (25) (H) and state enabling legislation found codified at Ark. Code Ann. §§ 20-77-301 *et seq.*, the Arkansas Medicaid Program has asserted an interest in the settlement. The value of the interest is at least $215,645.30 and defendants respectfully reserve the right to amend the value to reflect additional payments made on behalf of plaintiff. Defendants affirmatively state that plaintiff knew of the interest of the Arkansas Medicaid Program at the time she entered into a full and complete settlement of all claims of any nature, whether past or future, arising out of her injuries. Defendants further affirmatively state that plaintiff is estopped to deny the interest of the Arkansas Medicaid Program. Defendants further acknowledge the plaintiff's attorneys have assured defendants that the sum of $219,156.78 is being held in a trust account pending resolution of this dispute.

5. Defendants deny that the funds in dispute constitute plaintiff's property. Defendants affirmatively state that the plaintiff has assigned her interest in the funds to

the Arkansas Medicaid Program, and that she is holding the disputed funds for constructive trust in favor of the Arkansas Medicaid Program.

6. Defendants deny all factual allegations contained in paragraph 6 of the complaint. Defendants further deny plaintiff's characterization of law contained in paragraph 6 of the complaint. Defendants deny this court has jurisdiction.

7. Paragraph 7 of the complaint sets forth excerpts of federal law and does not assert to which response is necessary, however, to the extent response is deemed necessary, same are denied.

8. Defendants admit that plaintiff suffered injuries on or about January 1, 1996. Defendants deny the remaining allegations of paragraph 8 of the complaint.

9. Defendants deny the allegations of paragraph 9 of the complaint.

10. Paragraph 10 of the complaint contains no allegation of fact to which response is required, however, to the extent response is deemed necessary, same are denied. Defendants affirmatively state that 42 U.S.C. § 1396a(a)(25)(H) mandates the enactment of Ark. Code Ann. §§ 20-77-301 *et seq.*

11. Paragraph 11 of the complaint contains no allegation of fact to which response is required, however to the extent response is deemed necessary, same are denied. Defendants affirmatively plead that Ark. Code Ann. §§ 20-77-301 *et seq.* was enacted as required by 42 U.S.C. § 1396a(a)(25)(H).

12. Paragraph 12 of the complaint does not allege facts to which response is required, however, to the extent response is deemed necessary, same are denied. Defendants affirmatively state that Ark. Code Ann. §§ 20-77-301 *et seq.* was enacted as required by 42 U.S.C. § 1396a(a)(25)(H). Defendants expressly deny that 42 U.S.C. § 1396p(a)(4) is applicable to this dispute.

13. Defendants deny that the underinsured motorist coverage should be excluded from any computations herein. Underinsured motorist coverage is a third party payer within the meaning of 42 C.F.R. § 433.136. Alternatively pleading, if the $25,000.00 underinsured motorist coverage is plaintiff's property she had, at all times relevant hereto, resources in excess of the $2,000.00 resource limit. The excess resources render plaintiff, at all times relevant hereto, ineligible for benefits administered by the Arkansas Medicaid Program. If she was ineligible she is not a Medicaid recipient. It she is not a Medicaid recipient the provisions of 42 U.S.C. § 1396p(a)(4) do not apply. If she is ineligible all payments by the Arkansas Medicaid Program were made in error. Permitting plaintiff to benefit from erroneous payments made in good faith by the Arkansas Medicaid Program results in an unjust enrichment to plaintiff. Moreover, if plaintiff was at all times ineligible for benefits, the Arkansas Medicaid Program has an absolute right to recover all erroneous payments made on behalf of plaintiff. The total amount paid by Medicaid is $218,940.19 and increases as plaintiff receives additional health care services.

14. Paragraph 14 is in the nature of a prayer for relief and contains no allegations of facts to which response is required, however, to the extent response is deemed necessary same are denied. Defendants affirmatively plead that

plaintiff, having negotiated a full and complete settlement of all claims of any nature, whether past or present, arising out of the injuries without notice of settlement proceedings to defendants is estopped to deny reimbursement of at least $215,645.30 to the Arkansas Medicaid Program. Defendants further affirmatively plead that the funds at issue are being held in constructive trust for the Arkansas Medicaid Program.

15. Paragraph 15 is in the nature of a prayer for relief and contains no allegations of facts to which response is required, however, to the extent response is deemed necessary same are denied. Defendants affirmatively plead that plaintiff, having negotiated a full and complete settlement of all claims of any nature, whether past or present arising out of the injuries without notice of settlement proceedings to defendants is estopped to deny reimbursement of at least $215,645.30 to the Arkansas Medicaid Program. Defendants further affirmatively plead that the funds at issue are being held in constructive trust for the Arkansas Medicaid Program.

WHEREFORE, defendants pray that the Court enter its order dismissing the complaint and directing plaintiff to reimburse the Arkansas Medicaid Program full reimbursement of expenditures made on behalf of Heidi Ahlborn.

Respectfully submitted,

ARKANSAS DEPARTMENT
OF HUMAN SERVICES
OFFICE OF CHIEF COUNSEL

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

HEIDI AHLBORN, Plaintiff	)	
VS.	)	CASE NO.
ARKANSAS DEPARTMENT OF HUMAN SERVICES; ET AL, Defendants	)	4:02CV00607 GTE

STIPULATION

Come Heidi Ahlborn, Plaintiff herein, and Arkansas Department of Human Services; the Director of the Arkansas Department of Human Services; and Director of the Third Party Liability Unit, Division of Medical Services of the Arkansas Department of Human Services, Defendants, and who hereby stipulate as follows:

1. Plaintiff contends that Defendants' rights, pursuant to Ark. Code Ann. § 20-77-301, *et seq.*, are, by virtue of the constitutional supremacy clause, limited by 42 U.S.C. § 1396p(a)(1), as a consequence of which Defendants' rights of subrogation or reimbursement, by reason of Medicaid benefits provided to or on behalf of Plaintiff, are limited to that portion of Plaintiff's recovery in a previous third party tort action which represents the past medical expense component of her recovery. Defendants contend that, pursuant to 42 U.S.C. §1396a(a)(25), as implemented by Ark. Code Ann. §20-77-301 *et seq.*, they are entitled to reimbursement from the proceeds of the aforesaid settlement in the amount of $216,645.30, that being the amount

of Medicaid benefits provided to on or behalf of Heidi Ahlborn as of the date of the settlement of the third party action. For purposes of this stipulation, these competing contentions are designated as the "statutory construction issue."

2. Plaintiff negotiated a settlement of her claims. The gross amount of the settlement is $550,000.00 as follows: (a) $25,000.00 from Plaintiff's underinsured motorist coverage; (b) $525,000.00 from third party tortfeasors. The settlement did not designate portions of the damages for medical and non-medical damages. Plaintiff contends that, as a matter of law, the uninsured motorist coverage is not subject to Defendants' claim for reimbursement. Defendants contend that, as a matter of law, all sources of recovery are available for reimbursement.

3. It is stipulated that Plaintiff prepared and intended to submit a reasonable estimation of the value of Plaintiff's third party tort claim to the jury. The proposed estimation of damages, absent any consideration of liability, describes Plaintiff's damages as approximately $3,040,708.12. The settlement represents approximately one-sixth (1/6) or 16.5% of the estimated value of damages. Therefore, the parties agree, in the event Plaintiff prevails on the statutory construction issue, that Defendant shall be reimbursed and paid from funds held in trust by Plaintiff's attorneys, pending a resolution of this issue, 16.5% of past Medicaid payments, or $35,581.47 in full satisfaction of Medicaid's right of reimbursement.

In the event Defendants prevail upon the statutory construction issue, it is stipulated and agreed that Defendants shall be entitled to reimbursement from the aforesaid funds the sum of $215,645.30.

It is agreed that this stipulation is entered into by Plaintiff and Defendants for the sole purpose of obviating the necessity of adducing evidence as to the reasonable value of Plaintiff's third party tort claim and this stipulation shall in no way affect the relative positions of the parties as regards the statutory construction issue, nor shall this stipulation in any way affect the parties' rights of appeal from the statutory construction issue as determined by the final judgment entered herein.

Dated this 13th day of February, 2003.

HEIDI AHLBORN

Plaintiff

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ARKANSAS DEPARTMENT OF HUMAN SERVICES; DIRECTOR OF THE ARKANSAS DEPARTMENT OF HUMAN SERVICES; AND DIRECTOR OF THE THIRD PARTY LIABILITY UNIT, DIVISION OF MEDICAL SERVICES OF THE ARKANSAS DEPARTMENT OF HUMAN SERVICES

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

HEIDI AHLBORN, Plaintiff VS. ARKANSAS DEPARTMENT OF HUMAN SERVICES; DIRECTOR OF THE ARKANSAS DEPARTMENT OF HUMAN SERVICES; AND DIRECTOR OF THE THIRD PARTY LIABILITY UNIT, DIVISION OF MEDICAL SERVICES OF THE ARKANSAS DEPARTMENT OF HUMAN SERVICES Defendants	)	CASE NO. 4-02-CV. 00607 GTE

DEFENDANTS' STATEMENT OF MATERIAL FACTS

(Filed Mar 06, 2003)

Defendants, pursuant to FRCR Rule 56 and Local Rule 56.1, submits the following statement of the material facts to which they contend there is no genuine issue to be tried:

1. Plaintiff, Heidi Ahlborn, is an individual residing in the State of Arkansas.

2. Defendant, Arkansas Department of Human Services (ADHS) is an agency within the Executive Branch of Government for the State of Arkansas. Defendant, Kurt Knickrehm is the Director of ADHS. Defendant

Roy Jeffus is the Interim Director of the ADHS, Division of Medical Services (DMS). Defendant, Wayne E. Olive is the Administrator, ADHS/DMS Third Party Liability Unit.

3. ADHS administers the Medicaid program for the State of Arkansas.

4. On or about January 2, 1996 plaintiff was injured in a motor vehicle accident. Plaintiff, 19 years old at the time of the accident, sustained injuries and needed medical care.

5. Plaintiff applied to receive Medicaid through ADHS.

6. ADHS approved plaintiff's application for Medicaid.

7. Plaintiff also applied to the Social Security Administration to receive Supplemental Security Income (SSI). SSI recipients also receive Medicaid benefits from ADHS.

8. Plaintiff notified medical care providers to submit accident related claims to ADHS.

9. ADHS received, processed and paid claims for accident related medical services.

10. The amount billed to ADHS for accident related services is approximately $320,000.00. ADHS paid health care providers $215,645.30. Payment by ADHS fully extinguished plaintiff's financial obligation.

11. On or about May 23, 1996 ADHS sent a questionnaire to plaintiff. Plaintiff returned the questionnaire and informed ADHS she had engaged an attorney, John Casteel.

12. On or about July 17, 1996 ADHS wrote to Mr. Casteel. The correspondence included an itemization of charges paid by Medicaid.

13. On or about January 6, 1997 ADHS wrote to Mr. Casteel and provided an updated itemization of charges paid by Medicaid.

14. On or about April 11, 1997 plaintiff, through Mr. Casteel, filed a personal injury claim in the Circuit Court of Independence County, Arkansas.

15. Plaintiff did not name ADHS a party to the proceeding and Mr. Casteel did not serve notice or pleadings on ADHS.

16. On or about July 29, 1997 Mr. Casteel telephoned ADHS and requested a waiver of the Medicaid claim. Mr. Casteel informed ADHS of a $25,000.00 policy limits recovery.

17. ADHS denied the request for a waiver of the Medicaid claim.

18. On or about September 8, 1997 Mr. Casteel made a second verbal request for a waiver of the Medicaid claim. ADHS directed Mr. Casteel to submit a written request.

19. On or about September 8, 1997 plaintiff, through Mr. Casteel submitted a written request for a waiver of the Medicaid claim. The request was not granted.

20. On or about December 23, 1997 plaintiff's present counsel wrote ADHS concerning a $25,000.00 underinsured motorist (UIM) coverage recovery. Plaintiff asserted the UIM coverage was not subject to the Medicaid claim.

21. On or about December 29, 1997 ADHS responded, voicing disagreement with plaintiff's assertion UIM coverage is not subject to a claim by ADHS.

22. On or about January 27, 1998 plaintiff wrote ADHS. The letter afforded ADHS and plaintiff's former counsel 20 days in which to assert a claim against the UIM coverage.

23. ADHS and plaintiff's former counsel intervened in the pending lawsuit.

24. On or about May 12, 1998 the circuit court entered an order with respect to the interests of plaintiff's counsel.

25. On or about May 16, 1998 the circuit court entered an order directing plaintiff's counsel to place the remaining UIM funds in a trust account pending resolution of plaintiff's dispute with ADHS.

26. On or about October 2, 1998 ADHS requested notice of future hearings in the circuit court action.

27. In mid 2002 plaintiff negotiated a settlement with a remaining tortfeasor. Plaintiff executed a release in favor of the tortfeasor.

28. ADHS was not involved in the settlement process and has not executed a release.

29. The total recovery is $550,000.00.

30. The total paid by Medicaid for services related to the accident is $215,645.30.

31. The parties have stipulated that, had plaintiff gone to trial, she would have offered proof that her damages are

$3,040.708.12. ADHS does not intend to offer proof on this question and agrees, for purposes of this dispute, plaintiff's figure is a reasonable estimation.

Respectfully submitted,

ARKANSAS DEPARTMENT
OF HUMAN SERVICES
OFFICE OF CHIEF COUNSEL

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

HEIDI AHLBORN, Plaintiff VS. ARKANSAS DEPARTMENT OF HUMAN SERVICES; DIRECTOR OF THE ARKANSAS DEPARTMENT OF HUMAN SERVICES; AND DIRECTOR OF THE THIRD PARTY LIABILITY UNIT, DIVISION OF MEDICAL SERVICES OF THE ARKANSAS DEPARTMENT OF HUMAN SERVICES Defendants	)	CASE NO. 4-02-CV00607 GTE

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Filed Mar 06, 2003)

* * *

EXHIBIT 3

Department of Health & Human Services — Health Care Financing Administration

Regional Office VI
1200 Main Tower Building
Dallas, Texas 75202

June 1, 1988

DALLAS REGIONAL MEDICAL SERVICES
LETTER NO. 88-23

To: State Agencies Administering Approved Medical Assistance Plans

SUBJECT: State Third Party Liability (TPL) Subrogation Legislation

This is to advise you of a development in TPL subrogation legislation which is occurring in many States and which is in conflict with the Social Security Act. We refer to the passage of State lien laws which permit a Medicaid recipient, who initiates pursuit of TPL recovery from a liable third party, to keep a fixed percentage of the recovered amounts before the State (and Federal Government) receives its share of the settlement. Recently we were informed by counsel that these provisions are in conflict with Section 1912 of the Act.

Section 1902(a)(45) of the Act mandates, as a condition of eligibility, that recipients assign to the State, in accordance with Section 1912, their right to recover from third parties. Section 1912(b) of the Act states that the remainder of any amounts collected under an assignment pursuant to Section 1912(a) shall be paid to the recipient after the State recovers (with appropriate reimbursement to the

Federal Government) what it paid on behalf of the recipient.

In the absence of specific State provisions assuring full reimbursement of the Federal share, the State laws in question would be in conflict with Section 1912(b). As a result, the State's actual recovery becomes impermissibly reduced such that the full Federal share (based on the total net recovery) would not be refunded. The recipient has a right only to the remainder after Medicaid payments are fully reimbursed.

While a State is certainly permitted to give part (or even all) of its recovery to a recipient, Section 1912 does not allow a State to give away the Federal share. Moreover, since Title XIX does not authorize any payments to the recipient until Medicaid is fully repaid, any payment to recipients can be made only after the State has credited its recovery and established the amount of the Federal share to be returned.

Furthermore, the only amounts which can be paid out prior to State recoupment are legitimate administrative expenses. This is based upon an interpretation of "net recovery" in Section 1903(d)(3) of the Act, which speaks about the pro rata share of the recovery to which the United States is equitably entitled. "Net recovery" is interpreted to mean the settlement amount less procurement costs, including attorney fees. The regulation which discusses the basic rule is applicable to Medicare beneficiaries (42 CFR 405.423(b) and (c)), but, by analogy, a similar application to Medicaid recipients can be made.

To The Reader Of "Third Party Liability in The Medicaid Program: A Guide To Successful State Agency Practices"

Notice Of Errata

This is to advise all readers of the Guide that there are three statutory references in State lien laws in the recently updated Guide which are in conflict with Federal law: The provisions in question are cited below. In essence, these provisions state that any recipient who initiates an action to recover damages or compensation from a liable third party shall receive no less than a certain fixed percentage of the total amount recovered after the deduction of attorney fees and costs.

The references are found in section IV of the Guide, entitled Successful State Practices, Part E, Model Legislation. Please note that only those paragraphs cited below are in conflict with the Federal statute, not the entire law, and that the sections should be annotated as being in conflict with Federal law:

Arkansas – Public Welfare Statute #83 – 171.1 C
District of Columbia – Health Care Assistance Reimbursement Act of 1984 – Section 8. Lien (c)
Iowa Code 498 – 75.4(2)

The basis for legal conflict is found in section 1912(b), of the Social Security Act. This section states that the remainder of any amounts collected under an assignment pursuant to section 1912(a) shall be paid to the Medicaid recipient after the State recovers (with appropriate reimbursement to the Federal Government) what it paid on behalf of the recipient. The provisions in question could result in the State's recovering (and returning to the Federal Government) less than the full amount required

under section 1912(b). This conflict has only recently been called to our attention by counsel.

Arkansas has already repealed the referenced citations, and this reference, therefore, should be deleted from the Guide. With regard to the references for the District of Columbia and Iowa, those sections should be stricken as best practices. An annotation as to the conflict with Federal law in the absence of specific State provisions assuring full reimbursement of the Federal share based upon the total recovery, will suffice, with a cross reference to section 1912(b) of the Act.

If the reader has questions with regard to this notice, please contact:

Health Care Financing Administration
Bureau of Quality Control
Attn: Third Party Liability Branch
Room 273, East High Rise Building
6325 Security Boulevard
Baltimore, Maryland, 21207
Tel.: (301) 966-3393

EXHIBIT 21

DEPARTMENT OF HEALTH & HUMAN SERVICES — Health Care Financing Administration

433(D)-1-GEN;SEW

Region VIII
Federal Office Building
1961 Stout Street
Denver CO 80294

Sep 2, 1994

HEALTH CARE FINANCING ADMINISTRATION
REGIONAL IDENTICAL LETTER NO. 94-134

TO: STATE MEDICAID DIRECTORS

SUBJECT: THIRD PARTY LIABILITY RELATIONSHIP TO ISSUE OF LIENS

Federal law at section 1917(a) of the Social Security Act (the Act), and implementing regulations at 42 CFR 433.36 prohibit you from imposing liens against the property of any individual prior to his/her death because of medical assistance paid or to be paid on his/her behalf under the State plan, except in very limited circumstances.

However, section 1902(a)(25)(A) of the Act requires you to ascertain the legal liability of third parties to make payments which Medicaid would otherwise have to make. A third party is defined in the regulations at 42 CFR 433.136 as any individual, entity, or program that is, or may be, liable to pay all or part of the expenditures for medical assistance furnished under the State plan. This includes any monetary judgment or settlement from a tort or casualty liability claim. Where such a legal liability exists, section 1902(a)(25)(B) of the Act requires you to seek reimbursement for medical assistance payments already made.

A Medicaid recipient, at the time of application and as a condition of eligibility for Medicaid, assigns to the State his/her rights to payment from any third party and must cooperate with you in your pursuit of any third party who might be liable for payment, as required by section 1912(a)(1) of the Act. Thus, under this provision in Federal law and the implementing regulations at 42 CFR 433.145, you have claim to the amount recovered by the recipient, even though you may not have been a party to the litigation.

If, under State law, a lien is not being placed upon the Medicaid recipient's property, but rather is being placed upon the tortfeasor's (the defendant in the personal injury litigation) property or upon funds which are set aside to be used in a settlement of the litigation, but which have not become the recipient's property, then there would be no conflict with section 1917(a) of the Act. This is because section 1917(a) only precludes you from placing a lien on an individual's property.

However, under the circumstances described in this letter, you have an interest in the potential personal injury settlement when a recipient's rights to recover payment for medical care must have been assigned to you under section 1912 of the Act in order for him/her to be eligible for Medicaid. In that event, if you place a lien on these funds, it does not violate the Medicaid statute. However, you may not impose a lien on any of the recipient's property which has not been assigned to you.

If you have any questions, please call Sandra White at 303-844-6216, extension 376.

/s/ Gary Wilks
Gary Wilks
Associate Regional
Administrator
Division of Medicaid

EXHIBIT 22

[LOGO] DEPARTMENT OF HEALTH & HUMAN SERVICES — Health Care Financing Adm.

6325 Security Boulevar
Baltimore, MD 21207

JUN 5, 1996

TO : ALL STATE MEDICAID DIRECTORS

SUBJECT : Treating Disability Trusts Under Transfer of Assets, Trust, Estate Recovery, and Third Party Liability Rules – INFORMATION

Transfer and Trust Rules of OBRA '93

The Omnibus Budget Reconciliation Act of 1993 (OBRA '93) generally tightened eligibility rules governing the use of trusts by Medicaid applicants and recipients to discourage the transfer or sheltering of income and resources. Section 1917(c) of the Social Security Act (the Act) prescribes a penalty for individuals who transfer assets for less than fair market value. Section 1917(d) requires that States count, for purposes of an individual's Medicaid eligibility, trusts established by an individual (or certain other designated persons) if assets of the individual were used to form all or part of the trust corpus. An individual's "assets", as defined in section 1917(e)(1)(A), include all income and resources of the individual and of the individual's spouse, including any income or resources which the individual or spouse *is entitled to but does not receive* because of action by the individual or by certain other designated persons or entities.

Recently, several State courts have focused on the right of disabled individuals to receive Medicaid after assets they have received as a third party settlement or award have been placed into a trust. Because of the definition of assets

introduced by OBRA '93, the trust and transfer rules could apply to the proceeds of a disabled individual's settlement with or judgment against a third party, such as a casualty, insurance company. The rules could apply if the individual would have otherwise been legally entitled to these proceeds had they not been diverted away from the individual into a trust.

To be covered by the trust rules in section 1917(d), a trust must have been established by an individual, other than by will, with assets of the individual forming all or part of the trust corpus. The trust is considered to have been "established by the individual" if it has been established by the individual; the spouse; a person, including a court or administrative body with legal authority to act in place of or on behalf of the individual or spouse; or by a person, including any court or administrative body acting at the direction or upon the request of the individual or spouse.

If a court establishes a trust on behalf of or at the behest of an individual, it is covered by the trust rules. If a third party establishes a trust to satisfy a judgment or to pay a settlement and the trust is required by or approved by a court or administrative body, such a trust also falls within the coverage of section 1917(d). The court or administrative body has acted, in its legal capacity, on behalf of or at the request of the individual, to help establish the trust. Even absent the involvement of the court, if the individual has requested a trust, or accepted the terms of a trust to resolve a claim, the trust established by a third party falls within the coverage of section 1917(d) because the third party's actions are interpreted as those of a person acting at the direction of or upon the request of the individual.

As a general rule, then, a trust which results from a third party award or settlement is regarded as subject to the trust rules. This means that the corpus of the trust, interest on the corpus, and payments from the trust will be considered as either available resources, income, or as transferred for less than fair market value, depending upon the rules in section 1917(d) relating to how the trust is constructed and how much it can benefit the individual.

There are, however, several exceptions to the general rules which could apply to disability trusts established by third parties. Section 1917(d)(4)(A) says that the trust rules do not apply to a trust containing the as sets of a disabled individual under age 65. A second exception which could apply to third party settlements is contained in section 1917(d)(4)(C). This exception applies to "pooled" trusts which contain the assets of a disabled individual if the trust is established and managed by a non-profit association. Separate accounts must be maintained for each trust beneficiary, although these accounts may be pooled for purposes of managing and investing the trust funds.

<u>How Third Party Liability (TPL) Rules and Assignment of Rights Affect Trusts</u>

Federal law at section 1902(a)(25)(A) of the Act requires States to take all reasonable measures to ascertain the legal liability of third parties to <u>make</u> payments which Medicaid would otherwise have to make. A third party is defined in the regulations at 42 CFR 433.136 as any individual, entity, or program that is or may be liable to pay all or part of expenditures for medical assistance furnished under the State plan. Where such a legal liability exists, section 1902(a)(25)(B) requires a State to seek

reimbursement for medical assistance payments already made.

All individuals, at the time of application and as a condition of eligibility for Medicaid, must assign to the State their rights to payment for medical care from any third party and, subject to several exceptions, must cooperate with the State in its pursuit of any third party who might be liable for such payment as required by section 1912(a)(1) of the Act and 42 CFR 433.145 of the Medicaid regulations.

Thus, if an individual is already Medicaid eligible at the time he or she receives a third party settlement or judgment, the State has claim to any portion of the proceeds which were intended to pay for medical care for the individual that is covered by Medicaid. If the individual negotiates with the third party to place these amounts in a trust or otherwise fails to help make the amounts available to the State, then that individual has violated the condition of eligibility in section 1912 which requires the individual to cooperate with the State in obtaining payments for medical care from a third party. The individual would lose eligibility, regardless of the trust provisions and exceptions in sections 1917(d)(4)(A) and (C).

If State laws permits, a State can place a lien upon a third party's property, as in a situation involving the property of a tortfeasor or defendant in a personal injury suit, or upon funds which are set aside to be used in a settlement, but which have not yet become the property of the Medicaid applicant or recipient.

Section 1917(a) precludes States from placing liens on individual's property. However, because a potential personal injury settlement is not yet the plaintiff's property,

it can be subject to a TPL lien. Also, proceeds placed in a trust are not the property of the individual, but belong to the trust. As such, a State could place a TPL lien on any proceeds in a trust which could be used to pay for medical care covered in the State's plan, *provided there were State laws allowing this.*

To avoid the lien issue, but protect its rights, a State could come to an agreement with a plaintiff on the settlement of a tort action in order to get an appropriate share. Alternatively, the State could intervene in the case and represent its own interests directly. Since the individual has assigned to the State his or her rights to recover payment for medical care under section 1912, the State has an interest which it can represent directly.

When TPL Does Not Affect a Trust

The situation is different if the individual receives a third party settlement or judgment prior to applying for Medicaid. At the time of application, the third party has extinguished its legal liability to the individual by paying off the judgment or providing settlement proceeds. As a result, the individual will no longer have a right to any third party payments to assign to the State. This would be the case, unless the trust itself has the purpose of providing medical care that would otherwise be covered under Medicaid. In the case of such a trust, the State could pursue the trust as a liable third party. However, many trusts established as the result of a judgment or settlement are designed as "supplemental needs" trusts. These kinds of trusts are drafted so that the trustee can only pay for items or services for the individual which are not covered by Medicaid and/or other similar programs.

How the proceeds of a judgment or settlement will affect a disabled individual depends upon their form. If the individual has received the proceeds outright and retained them, they are likely to be counted as income or resources that are available to the individual for eligibility purposes. These proceeds, if large enough, could render the individual ineligible. If, on the other hand, the proceeds have been placed in a trust, the result depends upon whether the general trust rules apply or whether the trust qualifies for an exception.

Trusts Which Meet the Exceptions in Section 1917(d)(4)

A disabled individual might avoid having the trust counted if the trust is designed to meet one of the exceptions in section 1917(d)(4). To qualify for the exceptions, the trust must be established by an appropriate person or entity, as well as meet other requirements. For purposes of section 1917(d)(4)(A), the trust must be established for a disabled individual under age 65 by a parent, grandparent, legal guardian, or a court (but not by the individual). If the trust is established by the court and meets the other (d)(4)(A) requirements, then it would be subject to this exception. If the third party itself establishes the trust at the direction of or upon the request of any of the enumerated parties (all of whom are considered substitutes for the individual), the trust qualifies for this exception, with the third party acting, in effect, at the direction or upon the request of the individual.

The second exception for a disabled individual in section 1917(d)(4)(C) for a "pooled" trust requires that the trust be established and managed by a non-profit association, with an account for the individual established solely for the

individual's benefit by the individual, a parent or grandparent, legal guardian, or by a court. Again, if the trust account is established by the court, the exception would apply. The exception would also apply if the third party itself establishes the trust account at the direction of or upon the request of any of the enumerated parties.

Treating Excepted Trusts: Use of Funds and Estate Recovery

If the trust meets one of the exceptions, the state can monitor distributions from the trust to be sure that, in the case of a (d)(4)(A) trust, funds in the trust are used for the benefit of the disabled individual, and in the case of a (d)(4)(C) trust account *solely* for the disabled individual's benefit. Once the disabled individual dies, the State must collect whatever remains in the trust or account (if not retained by the "pooled" trust), up to the amount of medical assistance paid by the State.

If the State has not been totally reimbursed from the trust, then the State must follow the estate recovery rules in section 1917(b) of the Act. This provision requires that if an individual has been permanently institutionalized, the State must seek recovery from the individual's estate of any assistance correctly paid or upon sale of a home that has been subject to a lien imposed on account of medical assistance the State has paid.

Section 1917(b) also requires the State to pursue recovery from as individual's estate for the costs of nursing facility services, home and community-based services, and related hospital and prescription drug services, in the case of individuals who received these services when they were age 55 or older. States can also choose to pursue the costs

of any other items or services under the State plan for these same individuals.

If you or your staff have any questions concerning the above, please contact your regional office.

/s/ Sally K. Richardson
Sally K. Richardson
Director
Medicaid Bureau

cc: All Associate Regional Administrators
Division of Medicaid

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

HEIDI AHLBORN, Plaintiff VS. ARKANSAS DEPARTMENT OF HUMAN SERVICES; DIRECTOR OF THE ARKANSAS DEPARTMENT OF HUMAN SERVICES; AND DIRECTOR OF THE THIRD PARTY LIABILITY UNIT, DIVISION OF MEDICAL SERVICES OF THE ARKANSAS DEPARTMENT OF HUMAN SERVICES, Defendants	)	CASE NO. 4-02 CV 00607GTE

PLAINTIFF'S RESPONSE TO DEFENDANT'S STATEMENT OF MATERIAL FACTS

Comes Heidi Ahlborn, Plaintiff herein, and, for her response to Defendants' Statement of Material Facts, pursuant to Federal Rule 56.1, states:

1. Plaintiff does not controvert the accuracy of the factual matters set forth in paragraphs 1 thru 31 of Defendants' Statement of Material Facts as to which there is no genuine issue to be tried.

PLAINTIFF'S STATEMENT OF MATERIAL FACTS

Comes Heidi Ahlborn, Plaintiff herein, and, pursuant to Local Rule 56.1, submits, in connection with her

cross-motion for summary judgment, the following statement of material facts as to which she contends there is no genuine issue to be tried.

1. As a result of the January 2, 1996 motor vehicle accident, Plaintiff sustained severe and permanent personal injuries.

2. As a direct result of the motor vehicle accident on January 2, 1996, Plaintiff has incurred past medical expenses and will, as a direct result of these injuries, incur significant future medical expenses.

3. As a direct result of the injuries sustained in January 2, 1996 motor vehicle accident, Plaintiff has in the past experienced pain, suffering and mental anguish and will sustain mental anguish in the future as a consequence of these injuries.

4. As a direct result of injuries sustained in the January 2, 1996 motor vehicle accident, Plaintiff has a significant and permanent physical and mental injury and impairment.

5. Plaintiff has, as a direct result of injuries sustained in the January 2, 1996 motor vehicle accident, sustained a loss of earnings and working time in the past.

6. Plaintiff has, as a direct result of the injuries sustained in the January 2, 1996 motor vehicle accident, suffered a permanent and significant impairment of earning capacity.

7. As of January 2, 1996, Plaintiff was 19 years of age and had a future statistical life expectancy of 59.02 years.

8. As of January 2, 1996, Plaintiff was a full-time college student pursuing a degree in education with a view to a career in teaching and coaching.

9. As a result of injuries sustained in the January 2, 1996 motor vehicle accident, Plaintiff has been and will be unable to pursue a college-level education due to her permanently impaired level of cognitive and intellectual functioning.

10. The motor vehicle accident in which Plaintiff was injured on January 2, 1996 occurred within the State of Arkansas and Arkansas law would govern the elements of damage for which she would have been entitled to compensation had the claims arising out of that been adjudicated by way of trial.

11. Plaintiff has sustained and will sustain, as a result of the injuries received in the January 2, 1996 motor vehicle accident, the following elements of damage recognized by Arkansas law:

(a) Permanent injury;

(b) Past and future medical expenses;

(c) Past and future pain, suffering and mental anguish;

(d) Past loss of earnings and working time;

(e) Permanent impairment of ability to earn in the future.

12. At the time of the compromise settlement of the claims arising out of Plaintiff's injuries in the January 2, 1996 motor vehicle accident, there was no allocation by agreement or adjudication of the proceeds from such

compromise settlement among the elements of damage arising under Arkansas law.

HEIDI AHLBORN

Plaintiff

BY: H. DAVID BLAIR #65004
Attorney at Law
P. O. Box 2135
Batesville, Arkansas 72503
870-793-8350

-and-

PHILLIP FARRIS #74051
Attorney at Law
P. O. Box 2496
Batesville, Arkansas 72503
870-793-7556

By: /s/ H. David Blair
H. David Blair

[Certificate Of Service Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

HEIDI AHLBORN, Plaintiff VS. ARKANSAS DEPARTMENT OF HUMAN SERVICES; KURT KNICKREHM, DIRECTOR OF THE ARKANSAS DEPARTMENT OF HUMAN SERVICES; WAYNE OLIVE, DIRECTOR OF THE THIRD PARTY LIABILITY UNIT; ROY JEFFUS, INTERIM DIRECTOR, DIVISION OF MEDICAL SERVICES OF THE ARKANSAS DEPARTMENT OF HUMAN SERVICES Defendants	)	CASE NO. 4-02-CV.00607 GTE

DEFENDANTS' RESPONSE TO PLAINTIFF'S STATEMENT OF MATERIAL FACT

(Filed Apr. 23, 2003)

Defendants, for their response to Plaintiff's Statement of Material Fact submitted pursuant to Rule 56.1 state:

1. As a result of the January 2, 1996 motor vehicle accident, plaintiff sustained severe and permanent personal injuries.

Response: Admitted.

2. As a direct result of the motor vehicle accident on January 2, 1996, plaintiff has incurred past medical expenses and will, as a direct result of these injuries, incur significant future medical expenses.

Response: Defendants admit the motor vehicle accident resulted in past medical expenses, the costs of which were borne by defendants. Admits plaintiff will require future treatment.

3. As a direct result of the injuries sustained in January 2, 1996 motor vehicle accident, plaintiff has in the past experienced pain, suffering and mental anguish and will sustain mental anguish in the future as a consequence of these injuries.

Response: Admitted.

4. As a direct result of injuries sustained in the January 2, 1996 motor vehicle accident, plaintiff has a significant and permanent physical and mental injury and impairment.

Response: Admitted.

5. Plaintiff has, as a direct result of injuries sustained in the January 2, 1996 motor vehicle accident, sustained a loss of earnings and working time in the past.

Response: Admitted.

6. Plaintiff has, as a direct result of the injuries sustained in the January 2, 1996 motor vehicle accident, suffered a permanent and significant impairment of earning capacity.

Response: Admitted.

7. As of January 2 1996 plaintiff was 19 years of age and had a future statistical life expectancy of 59.02 years.

Response: Admitted.

8. As of January 2, 1996 plaintiff was a full-time college student pursuing a degree in education with a view to a career in teaching and coaching.

Response: Admitted.

9. As a result of injuries sustained in the January 2, 1996 motor vehicle accident, plaintiff has been and will be unable to pursue a college-level education due to her permanently impaired level of cognitive and intellectual functioning.

Response: Admitted.

10. The motor vehicle accident in which plaintiff was injured on January 2, 1996 occurred within the State of Arkansas and Arkansas law would govern the elements of damage for which she would have been entitled to compensation had the claims arising out of that been adjudicated by way of trial.

Response: Defendants admit the factual allegations of paragraph 10 but deny all statements, assertions or conclusions of law.

11. Plaintiff has sustained and will sustain, as a result of the injuries received in the January 2, 1996 motor vehicle accident, the following elements of damage recognized by Arkansas law:

(a) Permanent injury;

(b) Past and future medical expenses;

(c) Past and future pain, suffering and mental anguish;

(d) Past loss of earnings and working time;

(e) Permanent impairment of ability to earn in the future.

Response: Defendants admit the factual allegations of paragraph 11 but deny all statement, assertions and conclusions of all.

12. At the time of the compromise settlement of the claims arising out of plaintiff's injuries in the January 2, 1996 motor vehicle accident, there was no allocation by agreement or adjudication of the proceeds from such compromise settlement among the elements of damage arising under Arkansas law.

Response: Admitted.

Respectfully submitted,

ARKANSAS DEPARTMENT
OF HUMAN SERVICES
OFFICE OF CHIEF COUNSEL

/s/ Richard B. Dahlgren

Richard B. Dahlgren
Attorney – Bar #77038
700 Main Street – S260
Little Rock, AR 72201
(501) 682-8934

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